UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

ALIFAX HOLDING SPA,	)	
Plaintiff,	)	
v.	)	C.A. No. 14-440 S
ALCOR SCIENTIFIC INC.; and FRANCESCO A. FRAPPA,	)	
Defendants.	)	

MEMORANDUM AND ORDER

WILLIAM E. SMITH, Chief Judge.

Plaintiff Alifax Holding SpA requests an order striking the declarations of defendant Francesco Frappa (ECF No. 171-7) and the Defendants' computer code expert Daniel Smith (ECF No. 171-11) submitted in support of the Defendants' Reply Memorandum in Support of Defendants' Motion Summary Judgment (ECF No. 171-2). (See ECF No. 175.) Alifax argues that the affidavits are improper and untimely under this district's local rules and Rule 6(c) of the Federal Rules of Civil Procedure. The Court is not persuaded that Defendants' submitted these declarations in violation of either rule. Accordingly, for the reasons set forth herein, Alifax's motion to strike is DENIED.

I. Discussion

Alifax's asserts two bases for striking the Frappa and Smith declarations: the Defendants violated LR Cv 7(a)(4) and Rule 6(c) by submitting these declarations with the Defendants' reply memorandum rather than their motion to for summary judgment.

a. Local Rule LR Cv 7(a)(4)

LR Cv 7(a)(4) provides, in relevant part, "[a] reply shall not present matters that do not relate to the response, or reargue or expand upon the arguments made in support of the motion." This Court has "great leeway in the application and enforcement of its local rules." United States v. Roberts, 978 F.2d 17, 20 (1st Cir. 1992).

One of the principal disputes in this action is whether elements of the source code developed by Alifax for its ESR analyzer were improperly copied into code used in Alcor's competing ESR analyzer, the "iSED." (See, e.g., Second Am. Compl. ¶¶ 77-85.) The focal point of this disagreement concerns whether a particular iteration of the iSED software – version 1.04A - used certain conversion constants from Alifax's source code. In support of summary judgment, Alcor argues that the iSED's conversion parameters are necessarily "device dependent" and that any variant of the iSED software containing Alifax's constants was regardless "a pre-

production version that never shipped in any functional iSED machine." (Defs.' Mem. In Support of Mot. for Partial Summary Judgment 21, 26, ECF No. 147-1.)

Objecting to summary judgment, Alifax attempts to rebut this argument through a declaration from its expert, Dr. Bryan Bergeron. (Pl.'s Mem. of Law in Opp'n to Defs. Mot. for Partial Summary Judgment ("Pl.'s Opp'n") 21, ECF No. 161-1; Pl.'s St. of Addt'l Undisputed Facts ¶¶ 174-185.) In a short statement, Dr. Bergeron opines that, based on his review of the available evidence, software version 1.04A was installed on eleven iSED devices "manufactured and calibrated before June 2013." (Pl.'s Opp'n Ex. P at 2, ECF No. 163-18.) Bergeron previously opined that he observed the disputed conversion constants during his review of software version 1.04A. (See, e.g., Defs.' St. of Undisputed Facts Ex. 9 at 25-26, ECF No 137-13.) Taken together, these statements frame out an inference that the software installed on particular iSED devices sold to customers included Alifax's conversion constants.[1]

Alcor, through the Frappa and Smith declarations, argues that Bergeron's conclusion and inferences flowing therefrom are contrary to facts that cannot be genuinely disputed. (See Defs.' Reply

[1] At this juncture, the Court need not, and does not, decide whether Alifax is entitled to this inference or whether the Bergeron declaration or other evidence demonstrates that a genuine dispute of material fact exists concerning this issue. Those issues are left for another day.

Mem. in Support of Defs.' Mot. for Partial Summary Judgment 17-19, ECF No. 171-2.) Frappa's declaration (1) explains an exhibit to Alcor's Motion for Summary Judgment showing the software version installed at the manufacture or last date of service for particular iSED devices; and (2) attests that, regardless, software Version 1.04A did not include Alifax's proprietary conversion algorithm. (See Frappa Decl. ¶¶ 4-7, 10-20, ECF. No. 171-7.) Smith's declaration purports to corroborate Frappa's assertions and restates the conclusion from his rebuttal report that only the pre-production version of 1.04A contained Alifax's conversion constants. (See Smith Decl. ¶¶ 6-9, ECF. No. 171-11; Rebuttal Expert Rpt. of Daniel Smith, ECF No. 137-32, ¶ 4) On their face, these declarations "relate to [Alifax's] response" and thereby satisfy LR Cv 7(a)(4).

b. Rule 6(c)

Alifax's second argument is equally unavailing. If an affidavit supports a motion, pursuant to Rule 6(c) the affidavit "must be served with the motion." The rule's text does not address affidavits or declarations specifically submitted to support reply memoranda. See id. The absence of any express prohibition has led many courts to conclude that sworn statements responding to an opposition memorandum may properly be filed with a reply. See, e.g., Dubinsky v. Liberty Surplus Insurance Corporation et al., No. CV 08-06744-MMM-SHX, 2010 WL 11506086, at *5 n.44 (C.D. Cal.

June 15, 2010) ("Evidence submitted in support of a reply brief is proper if it rebuts arguments or exhibits proffered in opposition to the motion."); Doolittle v. Structured Invs. Co., LLC, No. CV 07-356-S-EJL-CWD, 2008 WL 5121591, *3 (D. Idaho Dec. 4, 2008) ("[R]eply affidavits that respond only to the opposing party's brief are properly filed with a reply brief"); McGinnis v. Se. Anesthesia Assocs., P.A., 161 F.R.D. 41, 42 (W.D.N.C. 1995) ("To strike the Defendant's reply affidavits would conflict with Rule 6(d)'s ultimate objective of resolving this motion on its mer-its."). The Court perceives no reason to depart from these rulings here.

This conclusion is not only consistent with the rule's plain language, but also its spirit, which seeks to minimize the risk of prejudice caused by unfair surprise. See Peters v. Lincoln Elec. Co., 285 F.3d 456, 476 (6th Cir. 2002) ("Fed. R. Civ. Pro. 6's requirement that cause be shown for affidavits not attached to the original motion, is designed to prevent the moving party from springing new facts on the nonmoving party 'when it is too late for that party to contest them.'") (quoting Republic Bank Dallas v. First Wis. Nat'l Bank of Milwaukee, 636 F. Supp. 1470, 1472 (E.D. Wis. 1986)); accord Orsi v. Kirkwood, 999 F.2d 86, 91 (4th Cir. 1993). Here, Alifax has failed to articulate any prejudice

whatsoever.[2] Alifax had months to assess the Frappa and Smith declarations prior to the hearing on Defendants' motion for summary judgment. Compare Cia. Petrolera Caribe, Inc. v. Arco Caribbean, Inc., 754 F.2d 404, 409 (1st Cir. 1985) (no cause shown for filing affidavits on day of motion hearing, leading to unfair surprise and prejudice); see also Vais Arms, Inc. v. Vais, 383 F.3d 287, 292 (5th Cir. 2004). ("[T]hose circuits that have expressly addressed this issue have held that a district court may rely on arguments and evidence presented for the first time in a reply brief as long as the court gives the nonmovant an adequate opportunity to respond."). Alifax could have sought leave to further supplement the record based on the substance of either declaration; it did not. Bearing these facts in mind, Alifax's hypertechnical interpretation of Rule 6(c) rings hollow.

Indeed, it is the Defendants – not Alifax – who plausibly raise the alarm of unfair surprise. (See Defs.' Opp'n to Mot. to Strike 2, ECF No. 188). A review of the summary judgment record, which includes Dr. Bergeron's reports, statements and excerpted deposition testimony, reveals no clear disclosure of the specific

[2] On the contrary, Alifax suggest the allegedly non-compliant declarations demonstrate the existence of disputed facts that preclude summary judgment. (See Pl.'s Mot. to Strike 2, ECF No. 174.)

opinion contained in his declaration.[3] Alcor was therefore entitled to respond by way of the Frappa and Smith declarations. See Peters, 285 F.3d at 477 ("While the Rules are silent as to timing matters with reply affidavits, precedent establishes that, in the face of new evidence, the court should permit the opposing party an opportunity to respond").

II. Conclusion

For the aforementioned reasons, Alifax's Motion to Strike the Untimely Declarations of Francesco Frappa and Daniel Smith (ECF No. 174) is DENIED.

IT IS SO ORDERED.

William E. Smith
Chief Judge
Date: October 16, 2018

[3] Alcor has not moved to strike the opinion or Dr. Bergeron's declaration.